

United States
Circuit Court of Appeals

For the Ninth Circuit.

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy
of the Estate of Cyrus E. Averill and FLOYD
C. BALDING,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'BRIEN, JR.
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles, California;

For Appellee Floyd C. Balding:

KENNETH E. MATOT, Esq.,

DAVID C. LEVENSON, Esq.,

542 South Broadway,
Los Angeles, California. [1*]

In the District Court of the United States

For the Southern District of California

Central Division

In Bankruptcy

No. 36534-C

In the Matter of

CYRUS E. AVERILL, JR.,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the District Court of
the United States for the Southern District of Cali-

*Page numbering appearing at foot of page of original certified
Transcript of Record.

formia: The Petition of Cyrus E. Averill, Jr., residing at No. 3704 Wasatch Street, in the City of Venice, County of Los Angeles, State of California, by occupation an Entertainer, and employed by Paradise Cafe, Inc. (or engaged in the business of), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at 674 Vermont Street, Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

CYRUS E. AVERILL, JR.

Petitioner

PAUL HITCH,

Attorney for Petitioner

State of California,
County of Los Angeles—ss.

I, Cyrus E. Averill, Jr., the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

CYRUS E. AVERILL, JR.,

Petitioner.

Subscribed and sworn to before me this 17th day of June, 1940.

DAVID LYNN,

Notary Public in and for said County and State.

(Official character.)

[Endorsed]: Filed June 18, 1940, 9:18 A.M. R. S. Zimmerman, Clerk. [2]

[Title of District Court and Cause.]

SPECIFICATIONS OF OPPOSITION TO
DISCHARGE OF BANKRUPT

Come Now Floyd C. Balding and Francis F. Quittner, as Trustee in Bankruptcy of Cyrus E. Averill, Jr., Bankrupt, and file these specifications of objection to discharge and allege as follows:

That Floyd C. Balding is a creditor of the above named bankrupt, whose claim has been regularly filed and allowed in the above entitled matter; that Francis F. Quittner is the duly elected, qualified and acting Trustee of the above named bankrupt, and duly authorized to oppose the bankrupt's discharge, and your petitioners hereby oppose the granting of a discharge to the said Cyrus E. Averill, Jr., from his debts, and for the grounds of such opposition, file the following specifications, to-wit:

Specification No. 1

That the said Cyrus E. Averill, Jr., has failed to keep books of account and records from which his financial condition and business transactions could be ascertained, in that the said Cyrus E. Averill, Jr., has failed to keep proper ledgers, journals, day books, cash receipt books, bank deposit books or other records from which his receipts and disbursements could be properly ascertained, or ascertained at all, and that by reason of the foregoing the bankrupt has been guilty of one of the omissions specified in Section 14-b of the Bank-

ruptcy Act of the [3] United States, and by reason thereof should be denied his discharge.

Specification No. 2

That such books and records pertaining to his financial condition and business transactions as the bankrupt did keep have been concealed or destroyed by him, and by reason of the foregoing the bankrupt has committed one of the acts specified in Section 14-b, Sub. 2 of the Bankruptcy Act of the United States, and should be denied his discharge.

Specification No. 3

That on or about the 15th day of March, 1939, with the intent to hinder, delay or defraud his creditors and to conceal the assets hereinafter described, therefrom, this bankrupt, Cyrus E. Averill, Jr., caused to be executed and recorded to Glen E. Bodell a certain chattel mortgage by which the said Cyrus E. Averill, Jr., pledged to the said Glen E. Bodell, to secure a certain promissory note of even date, the restaurant fixtures and business then conducted by the bankrupt at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California, known as Bud Averill's Paradise Cafe; that said purported note and chattel mortgage were given by the said bankrupt, Cyrus E. Averill, to the said Glen E. Bodell without any consideration whatsoever and for the sole purpose of concealing his said assets from his said creditors; that thereafter, the said Cyrus E. Aver-

ill, Jr., and Glen E. Bodell, and others, in furtherance of a conspiracy which then existed between them, did form the Paradise Cafe, Inc., a California corporation, and in furtherance of said plan, plot and scheme to defraud his said creditors, and that at all times since the organization of the said corporation, the said corporation has been and now is the alter-ego of the bankrupt, Cyrus E. Averill, Jr.; that thereafter and on or about the 18th day of June, 1940, the said Cyrus E. Averill, the Bankrupt herein, caused the [4] said Paradise Cafe, Inc., a corporation, to file a petition in bankruptcy, and by said means attempted to and did thereby cause the assets of said business to be concealed from and lost to the creditors of said bankrupt. That by reason of the foregoing the bankrupt has been guilty of one of the offenses specified in Section 29-b of the Bankruptcy Act of the United States, and one of the acts specified in Section 14-b of the Bankruptcy Act of the United States, and should be denied his discharge.

Specification No. 4

That on or about the 14th day of December, 1939, the objector, Floyd C. Balding, discovered that on or about the said 15th day of March, 1939, the said bankrupt, Cyrus E. Averill executed a mortgage covering Lots 115 and 116, Tract No. 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County, in favor of Glen E. Bodell, to secure a certain promissory note of said

date, payable to the said Glen E. Bodell; that said note and mortgage were made without any consideration whatsoever and was a fraud on creditors and was a continuation of the conspiracy between the said bankrupt, Cyrus E. Averill, Jr., and Glen E. Bodell and others. That thereafter, and on the 24th day of January, 1940, your objector, Floyd C. Balding, filed an action in the Superior Court of the State of California, in and for the County Los Angeles, and entitled Floyd C. Balding versus Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe; Paradise Cafe, Inc., a corporation, Glen E. Bodell, Bruce Davis and A. Schuer, being Numbered 448466, to set aside Fraudulent Chattel Mortgage and fictitious sale thereunder and to set aside fraudulent trust deed, and instruments hereinbefore referred to; that thereafter, and on or about the 15th day of June, 1940, a judgment was made and entered in the above entitled action by which it was adjudged and decreed by the Court that the said [5] chattel mortgage and mortgage hereinbefore mentioned, were vacated and set aside and declared null and void for any purpose whatsoever. That said acts of said Cyrus E. Averill, Jr., the bankrupt herein, and Glen E. Bodell were a continuing fraud and conspiracy, and within the twelve month period immediately preceding the filing of the petition in bankruptcy herein.

Specification No. 5

That in the course of the proceedings in bankruptcy, the said Bankrupt, Cyrus E. Averill, Jr., constructively refused to obey the order of the Court in this, that he caused the petition in bankruptcy of the fraudulently formed Paradise Cafe, Inc., a corporation, to be filed and thereby caused the property which had been fraudulently transferred to Glen E. Bodell and Paradise Cafe, Inc., a corporation, to be listed as assets of the Paradise Cafe, Inc., a corporation, when as a matter of fact the said assets were assets of said Cyrus E. Averill, Jr., and that said transfer by the said bankrupt, Cyrus E. Averill, Jr., to the said Glen E. Bodell and by the said Glen E. Bodell to the Paradise Cafe, Inc., a corporation, was declared by the order of the Superior Court in case No. 448466 to be fraudulent, which said fact was known to said Cyrus E. Averill, Jr., the bankrupt herein, and that by said conspiracy the Trustee in Bankruptcy in this case was unable to secure all of the assets which in fact was the property of this said bankrupt.

Specification No. 6

That by reason of the fraud and conspiracy by the bankrupt herein, Cyrus E. Averill, Jr., and Glen E. Bodell, as aforesaid, the said bankrupt has concealed from his creditors one-half of his assets in the said Paradise Cafe, Inc., a corporation, in the sum of Eleven Hundred Dollars (\$1100.00), more or less, and by reason thereof the said bank-

rupt estate herein has been defrauded by the said act of said bankrupt in said sum, which [6] was made and done by the said bankrupt for the purpose of paying said sum to the other parties conspiring with the said bankrupt, and in fraud of his creditors in this said proceeding.

Specification No. 7

That said bankrupt, Cyrus E. Averill, Jr., has conspired to conceal his assets in this matter with Glen E. Bodell and others in this, that said bankrupt, Cyrus E. Averill, Jr., transferred to the said Glen E. Bodell the said assets of the business conducted by the said bankrupt under the name of the Bud Averill's Paradise Cafe; that in furtherance of said fraud and conspiracy for the purpose of concealing his assets, the said Cyrus E. Averill, Jr., and Glen E. Bodell did cause the said Paradise Cafe to be organized as a corporation, and thereafter, and in furtherance of said plan, plot and conspiracy to defraud his said creditors, the bankrupt, Cyrus E. Averill, Jr., within a year from the date of the filing of his petition in bankruptcy herein, caused a petition in bankruptcy to be filed by the Paradise Cafe, Inc., a corporation, and did cause the said assets to be listed as the assets of said Paradise Cafe, Inc., a corporation, which was in furtherance of the plan, plot, scheme and conspiracy between said Glen E. Bodell and Cyrus E. Averill, Jr., the bankrupt herein, to conceal the assets of the said bankrupt, Cyrus E. Averill, Jr., which

said plan, plot and conspiracy merged and resulted in the filing of the bankruptcy petition by the Paradise Cafe, Inc., a corporation, all of which said acts are specified in Subdivision 4, Section 14, of the Bankruptcy Act of the United States, known as the Chandler Act.

Wherefore, these objectors, and each of them, pray that the petition of the bankrupt for his discharge in bankruptcy be denied.

FRANCIS F. QUITTNER

FLOYD C. BALDING

Petitioners

KENNETH E. MATOT, DAVID C.

LEVENSON and NAT ROSIN,

By KENNETH E. MATOT

Attorneys for Petitioners. [7]

United States of America

State of California

County of Los Angeles—ss.

Francis F. Quittner and Floyd C. Balding being duly sworn, depose and say: That they are the petitioners in the above entitled matter; that they have read the foregoing Specifications and know the contents thereof; that the same are true of their own knowledge except as to the matters which are therein stated upon information and belief and as to those matters that they believe it to be true.

FRANCIS F. QUITTNER

FLOYD C. BALDING

Subscribed and sworn to before me this 17th day of February, 1941.

[Seal] DAVID C. LEVENSON

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 18, 1941, by Referee.
Filed July 15, 1941, R. S. Zimmerman, Clerk. [8]

[Title of District Court and Cause.]

ORDER DENYING BANKRUPT'S
DISCHARGE

Specifications of objection to the discharge of the above named bankrupt having been filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter, and said specifications of objection having been duly heard and considered, and the undersigned Referee having filed herein his Memorandum of Decision thereon;

It is ordered that the above named bankrupt, Cyrus E. Averill, Jr., be and he is hereby denied a discharge from his debts in this matter.

Dated: June 9, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed June 10, 1941. R. S. Zimmerman, Clerk. [9]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION UPON
OBJECTIONS TO DISCHARGE

Specifications of objection to the discharge of the above named bankrupt were filed jointly in this case by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter. The said specifications are seven in number. The first and second charge that the bankrupt failed to keep or that he concealed certain books and records in connection with a cafe business in which he was engaged. The remaining specifications relate to an alleged fraudulent transaction hereinafter referred to in detail. All of the said specifications of objection having been duly heard they are now before me for decision.

I am entirely satisfied that the first and second specifications have not been sustained, but I am also satisfied that the bankrupt's discharge must be denied on account of the aforesaid fraudulent transaction. In that connection we are particularly concerned with the following provisions of the Bankruptcy Act relating to the discharge of a bankrupt:

“Section 14 (c): The Court shall grant the discharge unless satisfied that the bankrupt has * * * (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or

permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; * * * Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt [10] has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

The bankrupt, as stated, was engaged in the cafe business. On July 21, 1939, Floyd C. Balding, one of the objectors, was awarded a judgment against the bankrupt for approximately \$3,600.00. On July 25, 1939, four days later, there was recorded in the office of the County Recorder of Los Angeles County a chattel mortgage dated March 15, 1939, and covering the fixtures and equipment of the bankrupt's cafe business. The said chattel mortgage was given to one, Glen E. Bodell, to secure a certain promissory note executed by the bankrupt in favor of Bodell under date of March 15, 1939. On said July 25, 1939, there was also recorded a mortgage dated March 15, 1939, and covering the home occupied by the bankrupt and his wife. This mortgage was also given to the said Bodell to secure a note executed in his favor by the bankrupt under date of March 15, 1939. Likewise, on said July 25, 1939,

the said Bodell gave notice of his election to foreclose the said chattel mortgage and a few days later he became the owner of the assets covered thereby at foreclosure sale. Thereupon he transferred the said assets to a corporation known as Paradise Cafe, Inc., which he had caused to be formed, and thereafter the business theretofore conducted by the bankrupt was carried on in the name of the said corporation with the bankrupt acting at all times as manager, except perhaps for a brief period immediately following the transfer of the said assets to the corporation.

On January 24, 1940, Balding, who, as we have seen, had been awarded a judgment against the bankrupt on July 21, 1939, commenced an action in the Superior Court of Los Angeles County to set aside the aforesaid chattel mortgage and also the aforesaid mortgage on the home of the bankrupt. The said action went to [11] trial and on June 5, 1940, the trial judge made his decision in which he held that the two mortgages involved in the action were fraudulent and void as against the said Balding. However, the formal decree of the Court to this effect was not entered until July 2, 1940.

In the meantime, on June 18, 1940, the bankrupt filed his voluntary petition in bankruptcy in this matter and at the same time and through the same attorney, the aforesaid corporation, Paradise Cafe, Inc., also filed its voluntary petition in bankruptcy. The assets of the aforesaid cafe business were listed

in the schedules filed by the said corporation but were not in the first instance shown in the schedules of the bankrupt in this case. However, on June 28, 1940, the bankrupt in this case, with leave of Court, filed amendments to his schedules in which he listed the said assets. The said assets were duly sold in the bankruptcy Court and thereafter a controversy arose between the Trustee in this case and the Trustee in the corporation case over the proceeds of the sale, which controversy was later settled by an equal division of the proceeds in question between the two estates.

The petition and the schedules in the above mentioned corporation case were signed by Averill, the bankrupt in this case, as president of the said corporation. In explanation of this it is said that when the Superior Court held the aforesaid chattel mortgage to be fraudulent and void the aforesaid Bodell caused the corporation to transfer the assets covered by the chattel mortgage back to Averill. If this is true, it has not been explained why the said assets were in the first instance listed in the corporation's schedules and not in Averill's, except that it is claimed that this was done inadvertently.

There is no doubt but that the aforesaid chattel mortgage which was given by Averill to Bodell was a transfer within the [12] meaning of the above quoted provision of Section 14 (c) 4 of the Bankruptcy Act. That such transfer was made with

intent to hinder, delay and defraud Averill's creditors has been established by the aforesaid decision of the Superior Court. In this connection counsel for Averill argues that the Superior Court merely decreed that the chattel mortgage was fraudulent as to Balding, the plaintiff in the Superior Court action and that it is still an open question as to whether the chattel mortgage was fraudulent as to any other creditors. This, as I see it, is immaterial. A transfer made to hinder, delay and defraud even one creditor is, in my opinion, a bar to discharge under Section 14 (c) 4 of the Bankruptcy Act.

Since the chattel mortgage has been established as a fraudulent transfer the only questions for us to determine are these:

1. Was the said fraudulent transfer made within twelve months immediately preceding the filing of the petition in bankruptcy in this case?
2. Was the said fraudulent transfer a mere scheme or device on the part of the bankrupt in this case to conceal the assets of his cafe business with intent to hinder, delay and defraud his creditors and if so, were such assets so concealed at any time within twelve months immediately preceding the filing of the petition in bankruptcy in this case?

Under the above quoted provision of Section 14 (c) of the Bankruptcy Act, the burden is squarely on the bankrupt in this case to prove that the said

transfer was not made within twelve months before his bankruptcy and that the said transfer was not in fact a concealment of his assets within the same period with the intent to hinder, delay and defraud his creditors. I say the burden is on the bankrupt for the reason that the objectors in this case have shown to the satisfaction of the Court that there are reasonable grounds for believing either that the aforesaid transfer was made within twelve months before the commencement of this case, or [13] that the said transfer was in fact a concealment of the bankrupt's assets within twelve months before bankruptcy with intent to hinder, delay and defraud his creditors.

My conclusion in the matter is that the bankrupt has not met the burden imposed upon him as aforesaid. I am entirely convinced that one of two things happened, namely: (1) that the chattel mortgage here involved was not delivered by the bankrupt to Bodell until July 25, 1939, the day it was recorded, or (2) that if it was previously delivered it was definitely agreed and understood between Averill and Bodell that it was not to be effective for any purpose or recorded or used unless or until the aforesaid Balding recovered a judgment against Averill .

The date of the recording, July 25, 1939, is within the twelve months' period here in question. True, the chattel mortgage and the note secured thereby were both dated March 15, 1939, which is beyond the twelve months' period. Likewise, the chattel

mortgage was acknowledged before a Notary Public on the same day, March 15, 1939. But notwithstanding all of this, I am not satisfied that the instruments here in question were actually signed on the date they bear, to-wit, March 15, 1939.

In any event, however, it is not the date of the execution of an instrument which matters. It is the effective date of the delivery of such instrument which controls in a situation such as we have here in this case. In view of all of the facts and the circumstances of the case I am fully convinced, as I have said, that the chattel mortgage was not delivered before the commencement of the twelve months' period here involved, or if it was so delivered, that it was agreed that the delivery should not be effective for any purpose unless Balding recovered a judgment which he did not do until July 21, 1939, which, as we have seen, was within the period with which we are here concerned. [14]

If the chattel mortgage had actually been delivered, although not recorded, before the commencement of the twelve months' period specified in Section 14 (c) 4 of the Bankruptcy Act, and if, at the time of the delivery, or at any time thereafter, the bankrupt had no fraudulent agreement or understanding with the mortgagee with respect to the recording or the foreclosure of the mortgage, or the disposition of the assets covered thereby, and if the bankrupt did not fraudulently aid or assist in the foreclosure of the mortgage, I would be inclined to hold that the mortgage, although fraudulent in

its inception, would not be a bar to the bankrupt's discharge under Section 14 (c) 4. However, on this point I am completely satisfied that the chattel mortgage in this case was merely a scheme and device whereby the bankrupt endeavored to and succeeded in placing the assets of his cafe business beyond the reach of the aforesaid Balding while he, the bankrupt, continued to retain at least some beneficial interest in said assets or continued to derive some benefit therefrom. In other words, by the chattel mortgage and by its foreclosure by Bodell the bankrupt, with the aid and assistance of Bodell, endeavored to and actually succeeded in concealing the said assets from Balding. Such concealment continued from the time of the delivery of the chattel mortgage down to the commencement of this bankruptcy proceeding and that of the aforesaid corporation. The concealment having continued within the twelve months' period before bankruptcy, is a bar to the bankrupt's discharge, even if the chattel mortgage itself was actually delivered more than twelve months before bankruptcy. The doctrine of continuing concealment, as it affects a bankrupt's discharge, is too well known to require any citation of authority. Even if the act of concealment took place before the commencement of the twelve months' period specified in Section 14 (c) 4 of the Bankruptcy Act, if the thing concealed continued to be concealed [15] until some time within the said twelve months' period, it is a bar to discharge.

However, I cannot agree with counsel for the objectors that there was here a concealment under Section 29 (b) 1 of the Bankruptcy Act by reason of the manner in which the assets here involved were listed in the schedules in this and in the corporation case. A concealment under Section 29 (b) 1 must be committed "knowingly and fraudulently." I cannot conceive that the bankrupt "fraudulently" listed the assets here in question in the first instance in the corporation's schedules and not in his own. By so doing the bankrupt acquired no benefit or advantage of any kind whatsoever. On the contrary, it would have been to his advantage to have listed the assets in his own schedules instead of in the corporation schedules for then his personal creditors would have received the benefit therefrom and if his discharge was denied he would have the benefit of the dividends paid to his creditors out of the assets.

For the reasons here given an order will be entered forthwith denying the bankrupt's discharge in this matter.

Dated: June 9, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed July 15, 1941. R. S. Zimmerman, Clerk. [16]

[Title of District Court and Cause.]

PETITION AND REQUEST FOR EXTENSION
OF TIME TO FILE PETITION FOR RE-
VIEW.

Paul Hitch, being first duly sworn, deposes and says:

That he is the Attorney of Record in the above entitled matter for Cyrus E. Averill, Jr.; that since the Decision and Memorandum of Decision upon Objections to Discharge of Cyrus E. Averill, Jr., bankrupt has been served upon your affiant, bearing date of June 9, 1941, that affiant has not had the opportunity to thoroughly check the law in the matter.

Further, your affiant says that he has been unable to ascertain from Cyrus E. Averill, Jr., whether or not he intends to retain the present *consul* as his attorney in this matter.

Wherefore, your affiant respectfully requests that this Honorable Court grant an extension of two weeks in which Cyrus E. Averill, Jr., may petition the Court for a review of the above entitled matter.

Further, your affiant sayeth not.

PAUL HITCH

Attorney of Record

Time is hereby extended to and including the 3rd day of July, 1941, for Cyrus E. Averill, Jr. to file petition for a review in the above entitled matter.

June 19, 1941.

BENNO M. BRINK,

Referee in Bankruptcy [17]

State of California,
County of Los Angeles—ss.

Paul Hitch, being by me first duly sworn, deposes and says: that he is the Attorney of Record for Cyrus E. Averill, Jr., and petitioner herein, in the above entitled action; that he has read the foregoing Petition for Extension of Time and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

PAUL HITCH

Subscribed and sworn to before me this 19th day of June, 1941.

[Seal] T. E. WEATHERHOLT

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 19, 1941, by Referee.
Filed July 15, 1941, R. S. Zimmerman, Clerk. [18]

[Title of District Court and Cause.]

PETITION OF CYRUS E. AVERILL, JR., FOR
REVIEW OF REFEREE'S ORDER DENY-
ING DISCHARGE.

To the Honorable Paul J. McCormick, Judge of the
Above Entitled Court:

Comes Now your petitioner, Cyrus E. Averill, Jr. and respectfully represents as follows:

I.

That petitioner is the bankrupt in the within proceedings and does allege that heretofore a hearing was held upon the Specifications of Objections to the Discharge of your petitioner, which Specification was filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the trustee in the within proceeding.

II.

That a hearing was duly held upon the Specifications of Objection, and after the same was duly heard before Honorable Benno M. Brink, as Referee, the said Referee did, on the 9th day of June, 1941, enter an order denying the discharge of your petitioner.

III.

That your petitioner did obtain an order extending the time within which to file the within petition for review, and the same has been filed within said period of time. [19]

IV.

That petitioner does and did duly except to said Order, and further alleges that said Order is erroneous, among other reasons, because of the following errors:

1. That the said Order denying discharge is against the law applicable to the facts introduced at the time of the hearing;

2. That said Order is contrary to the facts introduced at the time of the hearing;

3. That the said Order was predicated upon a finding that there was a fraudulent transaction, and no facts were introduced at the time of the hearing of the said Objections to the discharge which could have, in any manner, justified a finding of fraud;

4. That no facts were introduced which could have sustained an Order denying the discharge as to any acts by your petitioner within the twelve months immediately preceding the filing of the petition in bankruptcy;

5. That no facts were introduced that could have justified the Order denying the discharge upon the basis that there was any fraudulent transfer within the twelve months immediately preceding the filing of the petition in bankruptcy, with intent to hinder, delay or defraud the creditors of your petitioner;

6. That neither the evidence introduced at the time of the hearing upon the Objections to the discharge nor the law applicable thereto could sustain an Order denying the discharge of your petitioner.

Wherefore, petitioner prays that the Order of the Referee denying the discharge be reviewed, and that the said Order and the whole thereof be reversed, and an Order made and entered granting to your petitioner his discharge in bankruptcy.

Dated: this 3 day of July, 1941.

CYRUS E. AVERILL, JR.

Bankrupt and Petitioner.

MARTIN GENDEL

Attorney for Petitioner.

(Verified)

[Endorsed]: Filed July 3, 1941, by Referee. Filed July 15, 1941. R. S. Zimmerman, Clerk. [20]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW FROM ORDER DENYING
DISCHARGE.

To the Honorable Paul J. McCormick, Judge of
the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy, of this court, before whom the above entitled matter is pending, do hereby certify to the following:

Cyrus E. Averill, Jr., the above named bankrupt, has duly filed his petition for review from an order made by your Referee in this matter denying the said bankrupt's discharge.

The Proceedings

On February 18, 1941, specifications of objection to discharge of the said bankrupt were filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter. The said speci-

fications were seven in number. The first and second charged that the bankrupt failed to keep or that he concealed certain books and records in connection with a cafe business in which he was engaged. The remaining specifications related to an alleged fraudulent transaction which is discussed in detail in your Referee's memorandum of decision hereinafter mentioned.

The said specifications of objection came on regularly for hearing before your Referee, the objectors appearing by their attorneys, Messrs. Kenneth E. Matot, David C. Levenson and Nat Rosin, and the bankrupt appearing by his attorney, Paul Hitch, [21] Esq., (Martin Gendel, Esq., has since been substituted as attorney for the bankrupt in this matter in the place and stead of the said Paul Hitch.) After the aforesaid hearing was concluded your Referee filed his aforesaid memorandum of decision in which he overruled the objectors' first and second specifications and in which he directed that the bankrupt's discharge be denied on account of the aforesaid fraudulent transaction. Thereafter, on June 9, 1941, a formal order was made denying the bankrupt's discharge and it is from this order that this review is taken.

The Questions Presented

The question presented by this review is this:

Does the evidence sustain your Referee's findings and his conclusions that the bankrupt should be denied his discharge on account of the aforesaid fraudulent transaction?

The Evidence and the Findings and Conclusions of
the Referee

The petitioner on review has not supplied your Referee with a transcript of the evidence but a summary of the evidence and your Referee's findings and conclusions are all set forth in his aforesaid memorandum of decision which is going up with this certificate.

The Order of the Referee

A certified copy of your Referee's order in this matter may be found in the Clerk's file in this case.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Specifications of objection to discharge of bankrupt.
2. Trustee's brief in re objections to discharge of the bankrupt.
3. Bankrupt's brief in re objections to discharge.
4. Reply brief of Trustee and claimant, Floyd C. Balding [22]
5. Memorandum of decision upon objections to discharge.
6. Petition and request for extension of time to file petition for review, and order thereon.
7. Petition of Cyrus E. Averill, Jr., for review of Referee's order denying discharge.

Dated: July 14, 1941.

BENNO M. BRINK

Referee in Bankruptcy.

[Endorsed]: Filed July 15, 1941. [23]

[Title of District Court and Cause.]

DECISION ON REVIEW OF REFEREE'S
ORDER DENYING DISCHARGE TO
BANKRUPT.

Upon consideration of the entire record, including the reporter's transcripts of testimony and proceedings before the referee, no error is shown in the order of the referee denying a discharge to the bankrupt. Accordingly, the referee's memorandum of decision, the findings of fact, conclusions of law, and the order denying bankrupt a discharge dated June 9, 1941, are and each is confirmed, and each specifically made the action and decision of this court. Exceptions allowed bankrupt.

Section 67d(2), Bankruptcy Act,

Section 67d(5), Bankruptcy Act,

Section 2957, California Civil Code,

Swift v. Higgins, (C.C.A. 9), 72 F.(2d) 791,

In re McKane, 19 A.B.R. 103.

Dated November 1, 1941.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Nov. 1, 1941. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that Cyrus E. Averill, Jr. hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, said appeal being from the order of the Referee denying the discharge to the bankrupt, which order is dated June 9, 1941, and the order of the Honorable Paul J. McCormick, United States District Judge confirming the order of Referee Benno M. Brink denying the bankrupt's discharge, said order of the District Court being dated November 1, 1941.

Dated: This 26 day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941. R. S. Zimmerman, Clerk. [25]

[Title of District Court and Cause.]

DIRECTIONS TO CLERK OF DISTRICT COURT FOR NOTIFICATION OF FILING NOTICE OF APPEAL AND MAILING COPIES THEREOF TO ALL PARTIES TO THE JUDGMENT OTHER THAN THE PARTY TAKING THE APPEAL.

To R. S. Zimmerman, Clerk.

Pursuant to the provisions of Rule 73-B of new Rules of Civil Procedure, you are hereby directed to give notice by mail of the filing of appeal, to the following parties to the judgment, other than

to the party taking the appeal or to his counsel of record, as follows:

Francis F. Quittner, Trustee

His Counsel: Nat Rosin

111 West 7th Street

Los Angeles, California

Floyd C. Balding

His Counsel: Kenneth E. Matot &

David C. Levenson

542 South Broadway

Los Angeles, California

Dated: this 26 day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941. R. S. Zimmerman, Clerk.

Mailed copies 11/26/41. E. L. S. [26]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL BY APPELLANT

I.

The District Court erred in rendering the order affirming the Referee's denial of discharge of the bankrupt.

II.

The order of the Referee and the order of the District Judge confirming the same are against the

law applicable to the facts introduced at the time of the hearing of the specifications of objection to the discharge.

III.

That the order of the Referee and the order of the District judge confirming the same are contrary to the facts introduced at the time of the hearing upon the specifications of objection to the discharge.

IV.

That the District Court erred in confirming the order of the Referee predicated upon a finding that there was a fraudulent transaction where no facts were introduced at the time of the hearing upon discharge which could in any manner justify the finding of fraud.

V.

That the District Court erred in sustaining the ruling of the Referee in that no facts were introduced which could have sustained a finding that your appellant had committed any acts of bankruptcy within the twelve months immediately preceding [27] the filing of petition in bankruptcy, which would have justified the denial of the discharge of bankrupt.

VI.

That the District Court erred in sustaining the finding of the Referee that there were any acts which constituted a fraudulent transfer or which constituted a transfer with intent to hinder, delay

or defraud the creditors of appellant, and that any of said acts incurred within four months or within twelve months prior to bankruptcy.

VII.

That both the District Court and the Referee in Bankruptcy erred in considering evidence which was introduced on hearings other than the hearing on specifications of objections to the discharge, and appellant particularly points out that the order of the District Judge confirming the Referee specifically refers to "transcripts" and that in actuality, only one transcript was submitted which contained the evidence introduced at the time of hearing of objection to the discharge.

VIII.

That the order of the District Court confirming the Referee was in error, since no one of the specifications of objection to the discharge or any part thereof contained facts sufficient to state a valid objection, under the Bankruptcy Act, to the discharge of your appellant.

IX.

That the District Court, in confirming the order of the Referee, erred in that neither the evidence introduced at the time of the hearing, nor the law applicable thereto, could sustain an order denying the discharge of your appellant.

Dated: this 26th day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941, R. S. Zimmerman, Clerk. [28]

[Title of District Court and Cause.]

STIPULATION RE CONTENTS OF DESIGNA-
TION OF RECORD: ORDER RE STIPU-
LATION

The appellant herein, through his counsel, and the appellee herein, through their counsel, do hereby stipulate that with reference to the exhibits covered by #8 of the stipulated designations of contents of the record on appeal, as follows:

1. The attached (a) complaint, (b) Findings of Fact and Conclusions of Law, and (c) Judgment, are correct copies of the exhibits desired by the appellant and appellees and referred to in the Recorder's Transcript designated as Item #7 of the stipulated designation, and more particularly being those portions of the file in action No. 448466 in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Balding vs. Averill, et al.

2. It is further stipulated that upon certification by the Clerk of the District Court said exhibits consisting of copies of complaint, findings of fact

and conclusions of law and judgment shall be and become a part of the record in the within appeal.

3. It is further stipulated that the Referee's Certificate on Appeal for Review and Order denying discharge in the matter of Cyrus E. Averill, Jr., Bankrupt, In the District Court of the United States, Southern District of California, Central Division, In Bankruptcy No. 36534-C, shall be also con [35] tained in the record on appeal.

Dated this 16th day of January, 1942.

MARTIN GENDEL,

Attorney for Appellant.

NAT ROSIN, KENNETH E. MATOT

and DAVID C. LEVENSON,

By NAT ROSIN,

Attorneys for Appellees.

The within stipulation is hereby approved and it is so ordered:

Jan. 20, 1942.

PAUL J. McCORMICK,

Judge of the District Court.

[Endorsed]: Filed Jan. 20, 1942. [36]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR., also known as C. EDWARD AVERILL, JR., also known as BUD AVERILL, doing business as BUD AVERILL'S PARADISE CAFE; PARADISE CAFE, INC., a corporation, GLEN E. BODELL, BRUCE DAVIS, A. SCHUER, ONE DOE, TWO DOE and THREE DOE,

Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT
CHATTEL MORTGAGE AND FICTITIOUS
SALE THEREUNDER, AND TO SET
ASIDE FRAUDULENT TRUST DEED

Plaintiff complains of the defendants, and each of them, and for cause of action, alleges:

I.

That the defendants are residents of the County of Los Angeles, State of California; that the defendant, Paradise Cafe, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its place of business in the City and County of Los Angeles, State of California.

II.

That the plaintiff is unaware of the true names or capacities, whether individual, associate, corporate, or otherwise, of the defendants, One Doe, Two Doe and Three Doe, and [37] therefore, sues said defendants, and each of them, by such fictitious names, and will ask leave of the Court to insert their true names and capacities, when same are ascertained, by appropriate amendments.

III.

That on the 15th day of September, 1938, an action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, being action No. 432080, entitled Floyd C. Balding, plaintiff vs. Bud Averill doing business as Bud Averill's Paradise Cafe, Fred Anderson and Charles Tobin; that on the 21st day of July, 1939, a judgment was recovered in said action in favor of the plaintiff, Floyd Balding and against said defendants, for a total sum of Thirty-three Hundred two and 20/100 Dollars (\$3302.20) and costs in the sum of Twenty-four and 90/100 Dollars (\$24.90); that thereafter, and on the 11th day of August, 1939, the Findings of Fact and Conclusions of Law and Judgment in said action were signed and filed in the office of the County Clerk of the County of Los Angeles, and that thereafter, and on or about the 16th day of August, 1939, said judgment was duly entered and docketed by the Clerk of said Court; that on or about the 9th day of October, 1939, an

execution was issued in said action as against any property, real or personal of the defendants named, and that said Execution was duly returned to the Clerk of the Superior Court by the Sheriff of Los Angeles County on the 24th day of October, 1939, wholly unsatisfied.

IV.

That prior to and at the time of the commencement of the action referred to in Paragraph III of this complaint, and after the indebtedness upon which said judgment was obtained had accrued, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud [38] Averill's Paradise Cafe, was the owner of and engaged in the cafe and saloon business, known as Bud Averill's Paradise Cafe, located at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

V.

That during the pendency of said action as alleged in Paragraph III of this action, and on or about the 15th day of March, 1939, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did make, execute and deliver to the defendant, Glen E. Bodell, a certain chattel mortgage covering all the fixtures and furnishings and equipment on the business of said defendant at 674-76 South Vermont Avenue,

Los Angeles, California, known as Bud Averill's Paradise Cafe; that at said time and place, so plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did make, deliver and execute to said Glen E. Bodell, a purported document under and by the terms of which the said defendant purported to convey in trust the title to that certain real property then owned by the said defendant, and more particularly described as follows, to-wit:

Lots 115 and 116, Tract 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County

as security for a purported debt of the said defendant, Cyrus E. Averill, Jr., to the defendant, Glen E. Bodell; that prior to the making of said encumbrance, said real property was free and clear of any and all encumbrances.

VI.

That thereafter, and pursuant to a notice posted under [39] and by virtue of the terms of the chattel mortgage above referred to, the purported mortgagee purported to elect to take possession of said property so chatteled, and purported to sell the same at public auction; that thereafter, and on or about the 31st day of July, 1939, the said property was purported to have been sold and bought in

by the defendant, Glen E. Bodell, and/or the defendant, Paradise Cafe, Inc.

VII.

That this plaintiff alleges that said incumbrances covering the personal and real property of the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, as aforesaid, was duly made and given without any consideration whatsoever, and for the sole purpose of hindering, delaying and defrauding this plaintiff.

VIII.

That thereafter and on or about the 9th day of August, 1939, and between the time that said Judgment was duly rendered and prior to the date of its being entered and docketed, the defendants, Glen E. Bodell, Bruce Davis and A. Schuer did incorporate said Paradise Cafe, in the State of California, and that said cafe is now known as the Paradise Cafe, Inc.

IX.

That pursuant to said sale referred to in Paragraph VI of this complaint, the said Glen E. Bodell took possession of the Paradise Cafe, and did, as plaintiff is informed and believes, and upon such information and belief alleges, turn over the assets so foreclosed to the Paradise Cafe, Inc.

X.

That the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud

Averill doing business as Bud Averill's Paradise Cafe, has been examined on [40] *on* Supplementry Proceeding pursuant to Section 714-715 of the Code of Civil Procedure of the State of California, and such examination has failed to disclose any assets out of which this judgment can be satisfied, other than the property above referred to, and as a result thereof this plaintiff is without any plain, speedy or adequate remedy at law.

XI.

That by reason of the above facts this plaintiff has been damaged in the sum of Thirty-three Hundred Twenty-seven and 10/100 Dollars (\$3327.10), together with interest thereon at the rate of 7% per anum from the 16th day of August, 1939.

And for a further, separate and second cause of action against the defendants, and each of them, plaintiff alleges:

I.

Sets out Paragraphs, I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the first cause of action and makes them a part of this his second cause of action, as though fully set forth herein.

II.

That the defendants, and each of them, did conspire to hinder, delay and defraud the plaintiff herein, and the plaintiff is informed and believes, and upon such information and belief alleges that said conspiracy to hinder, delay and defraud the

plaintiff herein was done between the 15th day of March, 1939, and the 9th day of August, 1939, by concealing the assets of the said defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, also known as Bud Averill doing business as Bud Averill's Paradise Cafe.

III.

That the plaintiff is informed and believes, and upon such information and belief alleges that said Glen E. Bodell, [41] Bruce Davis and A. Schuer did know that the action referred to in Paragraph III of the first cause of action, and made a part hereof by reference, was pending, and did know of the subsequent judgment, and plaintiff is informed and believes, and upon such information and belief alleges that said Glen E. Bodell, Bruce Davis and A. Schuer did conspire with said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, to conceal the assets belonging to said defendant, with full knowledge that the action hereinbefore referred to was pending.

IV.

That plaintiff is informed and believes, and upon such information and belief alleges the fact to be that during all the times mentioned in this complaint, the defendant, Glen E. Bodell was insolvent, a fact the defendants well knew.

V.

That plaintiff is informed and believes, and alleges the fact to be that the defendant, Paradise Cafe, Inc., a corporation, is and was during all the times herein mentioned, a one-man corporation controlled by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, and who owns and/or controls substantially all of the stock of said corporation, and that said corporation was in fact incorporated by said defendants, Glen E. Bodell, Bruce Davis and A. Schuer, representing the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, as a cloak to hide and conceal the interests of said defendant in the transaction herein referred, all of which said facts the defendants well knew. [42]

VI.

That between the 15th day of March, 1931, and the 9th day of August, 1939, said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, and Glen E. Bodell did associated themselves for the purpose of concealing the assets of said Cyrus E. Averill, Jr., as hereinbefore mentioned, for the purpose of defrauding and wronging this plaintiff, and did on the 15th day of March, 1939, execute the chattel mortgage herein-

before referred to and did at the same time likewise encumber his real property as hereinbefore alleged, for the purpose of conspiring to conceal the assets of the defendant, Cyrus E. Averill, also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and did so create said corporation on or about the 9th day of August, 1939, for the purpose of defrauding plaintiff's recovery of the amount of the judgment by sale of the said assets of said Paradise Cafe, and that the said defendant, Glen E. Bodell, without any consideration and to avoid the payment of the judgment herein referred to, did attempt to and intend to perfect an arrangement, combination and collusion between themselves whereby they might carry on said business, which plan, scheme and conspiracy between themselves was to carry on said business of the Paradise Cafe in the name of the corporation, to prevent the collection of the judgment procured by the plaintiff herein.

VII.

That said defendants in furtherance of said collusion and conspiracy, allowed the defendant, Cyrus E. Averill, Jr. also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, to assume and act as manager of said enterprise, which was called and known as the [43] Paradise Cafe, Inc., and allowed him to enter into possession of said property and to employ laborers, buy materials, contract indebted-

nesses, and sign drafts on the bank account of said Paradise Cafe, Inc., and was further authorized by said defendants to use the said bank as reference as to his relation with said enterprise.

VIII.

That the plaintiff is informed and believes and upon such information and belief alleges that the defendants, and each of them, have threatened to and will either dispose of or further encumber said property and every part thereof in a further attempt to conceal assets and to hinder and delay the plaintiff in collecting the said judgment, and by reason thereof the plaintiff has no plain, speedy or adequate remedy at law, or any other remedy at law, and that the said defendants, and each of them, will dispose of said property as aforesaid unless a Receiver to take charge of said property is appointed or an injunction is granted restraining the defendants, and each of them, from disposing of or in any way or manner incumbering said premises and personal property herein described, or any part thereof.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. For damages in the sum of Thirty-three Hundred Twenty-seven and 10/100 Dollars (\$3327.10) together with interest thereon at the rate of 7% per annum from August 16th, 1939;

2. That the defendants be adjudged to apply to the payment of said judgment and interest thereon,

together with the costs of this action, said property, debts, choses in action and equitable interest belonging to Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, or held in trust for him; or in which he is in anyway or manner beneficially interested; [44]

3. That the defendants be enjoined from selling, transferring or interfering with said property and equitable interest therein; -

4. That the defendants, and each of them, be prohibited from making an assignment or confessing any judgment, to enable other creditors or persons to obtain a preference over this plaintiff, or to take any portion of the defendants' property;

5. That a Receiver be appointed of all said property described in this complaint, and that said defendants be directed to execute to plaintiff an assignment thereof, and that said Receiver sell or otherwise dispose of the same and convert the same into money as soon as may be, and apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the plaintiff's judgment herein referred to;

6. That the Court adjudge and determine defendants' interest in the real estate and personal property as set forth in this complaint;

7. That the Court adjudge and determine the purported conveyance of the said business of Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, to the defendant, Glen

E. Bodell and Paradise Cafe, Inc., of his interest in the said business and property, to be fraudulent and of no effect and force whatsoever;

8. That the Court adjudge and determine that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, has been and now is the owner and entitled to the immediate possession of the personal and real property described herein;

9. That the Court adjudge and determine that Glen [45] E. Bodell, Paradise Cafe, Inc., Bruce Davis and A. Schuer have no interest whatsoever in and to the real and personal property described in this complaint;

10. That the sale under chattel mortgage be vacated and set aside and be declared null and void, and that said chattel mortgage be delivered to the Court for cancellation by the Court;

11. That the Deed of Trust conveying the property herein described be vacated and set aside and declared null and void;

12. For costs of suit, and for such other and further relief as to the Court may seem meet and just in the premises.

DAVID C. LEVENSON

Attorney for Plaintiff [46]

State of California,
County of Los Angeles—ss.

Floyd C. Balding being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

FLOYD C. BALDING

Subscribed and sworn to before me this 19 day of January, 1940.

DAVID C. LEVENSON

Notary Public in and for the County of Los Angeles, State of California. [47]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

The above-entitled cause came on regularly for trial on June 3, 1940, and was actually tried on

June 4, 1940, and continued on trial on June 5, 1940, in Department 12 of the above-entitled Court, sitting without a jury, a jury having been especially waived, Hon. William J. Palmer, Judge Presiding; David C. Levenson, Esq., appearing for the plaintiff and Messrs. Paul Hitch and Charles W. Rollinson, appearing for the defendants; and evidence both oral and documentary having been introduced, and the case argued and submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

I.

That it is true that the defendant, Paradise Cafe, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its place [48] of business in the City and County of Los Angeles, State of California, and that said corporation was organized on or about the 9th day of August, 1939.

II.

That it is true that on the 15th day of September, 1938, an action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, being action No. 432080, entitled Floyd C. Balding, Plaintiff, versus Bud Averill, doing business as Bud Averill's Paradise Cafe, Fred Anderson and Charles Tobin; that on the 21st day of July, 1939 a judgment was recovered in said action in favor of the plaintiff Floyd C. Balding and

against the defendants, for a total sum of Thirty-Three Hundred Two and 20/100 dollars (\$3302.20), and costs in the sum of Twenty-four and 90/100 dollars (\$24.90); that thereafter, and on the 11th day of August, 1939, the findings of fact and conclusions of law and judgment in said action were signed and filed in the office of the County Clerk of the County of Los Angeles, and that thereafter, and on or about the 16th day of August, 1939, said judgment was duly entered and docketed by the Clerk of said Court; that on or about the 9th day of October, 1939, an execution was issued in said action as against any property, real or personal, of the defendants named, and that said execution was duly returned to the Clerk of the Superior Court by the Sheriff of Los Angeles County on the 24th day of October 1939, wholly unsatisfied.

III.

That it is true that prior to the commencement of the action referred to in Paragraph II of these findings, and after the indebtedness upon which said judgment was obtained, had accrued, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing [49] business as Bud Averill's Paradise Cafe, was the owner of and engaged in the cafe and saloon, known as Bud Averill's Paradise Cafe, located at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That it is true that during the pendency of said action referred to in Paragraph II of these findings, and on or about the 15th day of March, 1939, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, did make, deliver and execute to the defendant, Glenn E. Bodell, a certain chattel mortgage covering all the stock in trade, fixtures, and furnishings and equipment on the business of the said defendant at 674-76 South Vermont Avenue, Los Angeles, California, known as Bud Averill's Paradise Cafe, which chattel mortgage was recorded on July 25, 1939, in Book 16694, Page 377, Official Records for Los Angeles County; that at said time and place, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, did make, deliver and execute to said Glenn E. Bodell, a mortgage covering certain real property then owned by said defendant, and more particularly described as follows, to-wit:

Lots 115 and 116, Tract 6052, as recorded in Book 67, Pages 71 and 72 of Maps, Records of Los Angeles, County,

which mortgage was recorded on July 25, 1939, in Book 16749 at page 189, Official Records, Los Angeles County; that prior to the making of said

encumbrance, said real property [50] was free and clear of any and all encumbrances, except that a declaration of homestead had been filed against the same.

V.

That thereafter, and pursuant to a notice posted under and by virtue of the terms of the chattel mortgage, the purported mortgagee purported to elect to take possession of said property so chatteled, and purported to sell the same at public auction; that thereafter, and on or about the 31st day of July, 1939, the said property was purported to have been sold and bought in by the defendant Glenn E. Bodell.

VI.

The Court finds that when executing the chattel mortgage hereinbefore referred to, the said defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, failed to comply with Section 3440 of the Civil Code of the State of California in that said defendant failed to publish a notice of intention to chattel mortgage said personal property within a seven days period, or at any time prior to the execution of said chattel mortgage covering said personal property as aforesaid, and that the transfer was executed when said *defendant* were contemplating insolvency and was without a valuable or any consideration, and it was fraudulent as against the plaintiff.

The Court finds that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, made, executed and delivered said chattel mortgage, covering the personal property as aforesaid, in contemplation of the insolvency [51] of said Cyrus E. Averill and said Cyrus E. Averill, Jr. also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did so for the purpose of evading the payment of a judgment in favor of the plaintiff herein, and that the transfer of said property and the execution of said chattel mortgage were without consideration.

VII.

The Court finds that the defendant Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, did on the 15th day of March, 1939, duly make, execute and deliver to the defendant Glenn E. Bodell, a mortgage covering the real property described in Paragraph IV of the findings; that the same was given in violation of Section 3442 of the Civil Code of the State of California, and was without a valuable or any consideration, and given for the purpose of hindering, delaying and defrauding this plaintiff; that said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr.,

also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and his said wife, did give said real estate mortgage above referred to, in contemplation of insolvency of said Cyrus E. Averill, Jr., and did so for the purpose of evading the payment of a judgment in favor of the plaintiff herein.

VIII.

That it is true that both the defendants, Cyrus E. Averill, Jr., and Glenn E. Bodell testified that the defendant, Glenn E. Bodell, loaned to the defendant Cyrus E. Averill, Jr., the sum of Eighty-five Hundred Dollars ((\$8500.00)), the Court finds that if said Glenn E. Bodell loaned [52] said sum to the defendant, Cyrus E. Averill, Jr., there was an express agreement entered into by and between them that no security be given for said loan or for any part of the total sum thus lent, if any; and said agreement was fulfilled by the parties until March 15, 1939, when the transactions hereinabove set forth were had, and were entered into voluntarily by defendant Averill.

IX.

That it is true that at the time the said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, executed and delivered the chattel mortgage hereinbefore mentioned, that no consideration passed from the defendant, Glenn E. Bodell, to the

defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, or to his said wife, and that said transfer was made without consideration of any kind or character whatsoever.

X.

That it is true that at the time the said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, executed and delivered the real estate mortgage hereinbefore mentioned, that no consideration passed to the defendant Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, or to his said wife, and that said mortgage was made without any consideration of any kind or character whatsoever. [53]

XI.

That it is true that on or about the 9th day of August, 1939, and between the time that said judgment was duly rendered and prior to the date of it being entered and docketed, the defendants Glenn E. Bodell, Bruce Davis and S. Schuer, did incorporate said Paradise Cafe in the State of California and that said cafe is now known as the Paradise Cafe.

XII.

That it is true that following said purported sale referred to in Paragraph V of these findings, the

defendant, Glenn E. Bodell, took possession of the Paradise Cafe, and did turn over the assets so foreclosed to the Paradise Cafe, Inc.

XIII.

That it is true that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, has been examined on supplementary proceedings pursuant to Sections 714, 715 and 717 of the Code of Civil Procedure of the State of California, and said examination failed to disclose any assets out of which the judgment herein referred to could be satisfied, other than the property hereinbefore referred to; and as a result thereof the plaintiff is without any plain, speedy or adequate remedy at law.

XIV.

That it is true that the acts of the defendants in executing said chattel mortgage and real estate mortgage as aforesaid, did intend to and did hinder, delay and defraud the plaintiff herein by concealing and disposing of the assets of the defendant, Cyrus E. Averill, Jr., and that the mortgaging transactions hereinabove set forth [54] were voluntarily accomplished by the defendant Averill to conceal the assets belonging to said defendant, Cyrus E. Averill, Jr., with full knowledge and that the action of Floyd P. Balding, plaintiff, vs. Bud Averill, doing business as Bud Averill's Paradise Cafe, Fred

Anderson and Charles Tobin, defendants, was pending.

XV.

That it is true that the defendant, Paradise Cafe, a corporation, knew when it acquired purported title to the aforesaid cafe and saloon business, and the assets thereof, as hereinabove set forth, that the purported title had been derived in the manner hereinabove set forth, knew the facts set forth in Paragraph IX hereof and in the first paragraph of Paragraph VI hereof, and knew that the attempted and purported transfer of title was fraudulent as to the plaintiff.

XVI.

That it is true that the defendants in furtherance of the scheme to conceal the assets of the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did allow said Cyrus E. Averill, Jr., to assume to act and to act as manager of said cafe known as the Paradise Cafe, and allowed him to enter into possession of said property and to employ help.

XVII.

The Court finds as untrue each and every allegation contained in the answers of the defendants, Cyrus E. Averill, Jr., Glenn E. Bodell and Paradise Cafe, Inc., a corporation, which is in any way in-

consistent with or contradictory to any allegation which the Court has specifically found to be true.

[55]

CONCLUSIONS OF LAW

I.

That the chattel mortgage dated March 15, 1939, made by the defendant, Cyrus E. Averill, Jr., and his aforesaid wife, in favor of Glenn E. Bodell, covering the stock in trade, fixtures and equipment contained in the cafe known as Bud Averill's Paradise Cafe, is fraudulent as against the plaintiff.

II.

That the mortgage dated March 15, 1939, made by the defendant, Cyrus E. Averill and his aforesaid wife, in favor of Glenn E. Bodell, covering Lots 115 and 116, Tract 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County, is fraudulent as against the plaintiff.

III.

That said conveyances were made and given by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and his aforesaid wife, without any consideration, and for the sole purpose of defrauding the plaintiff herein, and while in contemplation of insolvency of said Cyrus E. Averill, Jr.

IV.

That by reason thereof the conveyances made by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, to Glenn E. Bodell and his said wife, are vacated and set aside and declared null and void for any purpose whatsoever, in so far as concerns the plaintiff herein. [56]

V.

That the restraining order heretofore issued against the defendants restraining them from selling, transferring, encumbering, or in anywise disposing of or hypothecating the said real or personal property, shall continue in effect until further order of the Court.

VI.

That the plaintiff is entitled to have his costs and disbursements herein expended.

WILLIAM J. PALMER (Signed)

Judge of the Superior Court.

[57]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR. also known as C. ED-
WARD AVERILL, JR. also known as BUD
AVERILL doing business as BUD AVER-
ILL'S PARADISE CAFE; PARADISE
CAFE, INC., a corporation, GLEN E. BO-
DELL, BRUCE DAVIS and A. SCHUER,
Defendants.

JUDGMENT.

The above entitled cause came on regularly for trial on June 3rd, 1940, and was actually tried on June 4th, 1940 and continued on trial on June 5th, 1940, in Department 12 of the above entitled Court, sitting without a jury, jury having been expressly waived, Honorable William J. Palmer, Judge presiding; David C. Levenson, Esq., appearing for the plaintiff, and Messrs. Paul Hitch and Charles W. Rollinson, appearing for the defendants; and evidence both oral and documentary having been introduced, and the case argued and submitted for decision and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised;

Wherefore, by reason of the law and the findings [58] of fact,

It is ordered, adjudged and decreed that the Chattel Mortgage dated on or about March 15th, 1939, made by the defendant, Cyrus Edward Averill, Jr., and Virginia O. Averill, his wife, in favor of Glen E. Bodell, covering stock in trade, fixtures and equipment contained in the cafe known as Bud Averill's Paradise Cafe, which mortgage was recorded July 25, 1939 in Book 16694, Page 377, Official Records L. A. County, be and the same is hereby vacated and set aside, and declared null and void for any purpose whatsoever, insofar as concerns Plaintiff herein, and

It is further ordered, adjudged and decreed that the Mortgage dated on or about March 15th, 1939, made by the defendant, Cyrus Edward Averill, Jr. and Virginia Othelia Averill, his wife, in favor of Glen E. Bodell, covering Lots 115 and 116, Tract 6052, as recorded in Book 67, Pages 71 and 72 of Maps, Records of Los Angeles County, which mortgage was recorded July 25, 1939 in Book 16749, at page 189, Official Records for Los Angeles County, be and the same is hereby vacated and set aside, and declared null and void for any purpose whatsoever, and

It is further ordered, adjudged and decreed, that the restraining order heretofore issued against the defendants, restraining them from selling, transferring, encumbering or in anywise disposing of or hypothecating the aforesaid real or personal prop-

erty, shall continue in effect until further order of the Court, and

It is further ordered, adjudged and decreed that the plaintiff have and recover from the defendants, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, Glen E. Boddell, and Paradise Cafe, Inc., a corporation, his costs [59] and disbursements incurred herein, in the sum of \$15.35.

Dated: July 2nd, 1940.

(Signed)

WILLIAM J. PALMER

Judge of the Superior Court.

[60]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60 inclusive contain full, true and correct copies of Petition in Bankruptcy; Objections to Discharge; Order by Referee Denying Discharge; Referee's Memo. of Decision; Petition for Extension of Time to File Petition for Review; Order Extending Time to File Petition for Review; Petition for Review; Certificate of Referee on Petition for Review; Order of District Judge Confirming Order of Referee; Notice of Ap-

peal; Directions for Service of Notice of Appeal; Statement of Points on Appeal; Stipulation Designating Contents of Record on Appeal; Stipulation as to Contents of Record on Appeal with Exhibits (a), (b) and (c) Thereto; Bond for Cost on Appeal; Stipulation for Extension of Time to Docket Appeal and Order Extending Time to Docket Appeal, which together with the Reporter's Transcript of Testimony transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$10.35, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 30th day of January, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS AT HEARING ON
OBJECTIONS TO DISCHARGE OF BANK-
RUPT.

Los Angeles, California, April 18, 1941.

Appearances of Counsel:

For the Trustee:

NAT ROSIN, Esq.

111 W. 7th St., Los Angeles, Cal.

For Objecting Creditors:

KENNETH E. MATOT, Esq., and

DAVID C. LEVENSON, Esq.

542 South Broadway,

Los Angeles, California.

For the Bankrupt:

PAUL HITCH, Esq.

742 So. Hill St.

Los Angeles, California. [1*]

Los Angeles, California,

Friday, April 18, 1941, 2 P. M.

Mr. Rollinson: With reference to the objections to discharge, I don't believe I have any standing in Court except in so far as my client, Mr. Bodell, is charged with conspiracy in connection with it. I don't represent Mr. Averill.

[*Page numbering appearing at top of page of original Reporter's Transcript.]

The Referee: Who is going to appear for Mr. Averill on the objections?

Mr. Hitch: I will appear for Mr. Averill, your Honor.

Mr. Rosin: The trustee is represented by Nat Rosin, and one of the creditors, Floyd C. Balding, who is objecting, is represented by David Levenson. I will call the representative from the Superior Court.

Mr. Rollinson: There will be no necessity for that. We will stipulate that the record will speak for what it is, and it seems to me, so far as Mr. Balding is concerned, we will stipulate that the judgment of the Court and the findings of fact in that particular case may be considered as the evidence in the situation and as part of the record.

Mr. Levenson: In other words, you are stipulating the entire record in the Superior Court?

Mr. Rollinson: I don't see why Mr. Hitch could not do that as attorney for Mr. Averill.

Mr. Rosin: I want to understand the interest of Glenn [2] E. Bodell in the interest of the discharge to Mr. Averill.

The Referee: I don't think he can be a party.

Mr. Rollinson: He is not interested except he is charged with conspiracy in these objections.

The Referee: He is not a party.

Mr. Rosin: No, he is not a party.

The Referee: No judgment on the objections to discharge would bind Mr. Bodell.

Mr. Rollinson: Then I think I can be excused and retire from the Court room.

The Referee: We are glad to have you here.

Mr. Rosin: For the record, I just don't want to have any confusion.

Mr. Hitch: Yes, I will stipulate.

Mr. Levenson: So stipulated, is that right, Mr. Hitch?

Mr. Hitch: Let's see what it is.

The Referee: Do you want Mrs. Averill on the objections?

Mr. Levenson: We don't need her.

The Referee: Mrs. Averill is excused, if she cares to go.

Mr. Rollinson: And may her attorney be excused?

The Referee: The record may so show.

(Discussion off the record.)

The Referee: Specification No. 5 reads:

“That in the course of the proceedings in bankruptcy, the said bankrupt, [3] Cyrus E. Averill, Jr., constructively refused to obey the order of the Court in this, that he caused the petition in bankruptcy of the fraudulently formed Paradise Cafe, Inc., a corporation, to be filed and thereby caused the property which had been fraudulently transferred to Glenn E. Boddell and Paradise Cafe, Inc., a corporation, to be listed as assets of the Paradise Cafe, Inc., a corporation, when as a matter of fact the said assets were assets of Cyrus E. Averill, Jr., and that said transfer by the said bankrupt, Cyrus

E. Averill, Jr., to the said Glenn E. Bodell and by the said Glenn E. Bodell to the Paradise Cafe, Inc., a corporation, was declared by the order of the Superior Court in case No. 448466 to be fraudulent, which said fact was known to said Cyrus E. Averill, Jr., the bankrupt herein, and that by said conspiracy the Trustee in Bankruptcy in this case was unable to secure all of the assets which in fact was the property of this said bankrupt."

How did he refuse to obey any order of Court in the proceeding in bankruptcy?

Mr. Rosin: I don't think that was meant. It was the order of the Superior Court.

The Referee: I know, but that is not a ground of objection.

Mr. Rosin: No, but specifications 3, 4, 5, 6, and 7 are practically all tied up together on the same theory.

The Referee: I thought what you were trying to state [4] was a ground of objection in connection with a proceeding in bankruptcy, that he refused to obey the lawful order of Court.

Mr. Levenson: As counsel states, 3, 4, 5, and 6 practically read together.

The Referee: All right, proceed.

Mr. Levenson: Mr. Averill.

Mr. Rosin: Just a moment. Mr. Hitch, I understand that you are stipulating that this is the original file of pleadings and documents in Superior

Court action No. 448,446, of Floyd C. Balding versus Cyrus E. Averill, Jr., et al.

Mr. Hitch: That is right.

Mr. Rosin: Likewise this envelope 50164, is an envelope containing the exhibits filed in the action of Floyd C. Balding versus Averill.

Mr. Hitch: I believe that is correct.

Mr. Rosin: As I understand it, we cannot offer these as exhibits in this Court, but we may read from them into evidence.

The Referee: That is correct. The Clerk will insist on taking them back.

Mr. Rosin: Proceeding to the file in case 448,466, Superior Court of the County of Los Angeles, I call attention to the fact that the complaint has been filed in this action as set forth by the record on January 24, 1940, complaint to set aside fraudulent chattel mortgage and [5] foreclosure sale thereunder, and to set aside fraudulent trust deed.

Mr. Hitch: So stipulated.

Mr. Rosin: I presume the Court is going to take notice of this file and read the pleadings. There is no need of my reading the pleadings in the record. I am just trying to save time here.

The Referee: You can make that arrangement with the reporter. Indicate the papers that you want in the record and the reporter can, if the record has to be written up, go over to the Superior Court and copy them off.

Mr. Rosin: That is a good suggestion; I would like to do that, your Honor.

The Referee: Don't make it too voluminous. You will have a pretty heavy record if it is to go up. Do you want the complaint?

Mr. Rosin: I want the complaint, the Balding complaint that has been filed. There is no amended complaint, so there is only one complaint .

Mr. Hitch: I don't think there was any demurrer; a straight answer, as I remember it.

Mr. Rosin: I want the complaint of the plaintiff, likewise I want the findings of fact and conclusions of law that were filed on July 2, 1940, and were signed by Judge William J. Palmer of the Superior Court. [6]

The Referee: What is the date?

A. The order has no date, your Honor.

The Referee: The findings.

Mr. Rosin: Filed July 2, 1940, but there was no date in the document itself as to when they were signed.

Mr. Hitch: They were signed that date, as I remember.

The Referee: Just for identification, filed July 2, 1940.

Mr. Rosin: Yes, entitled "Findings of Fact and Conclusions of Law." Likewise, we want the judgment that was entered on July 5, 1940, filed July 2, 1940, and which was docketed on July 5, 1940, in Book 1085 at page 158, which judgment was signed on July 2, 1940, by William J. Palmer as Judge of the Superior Court. Likewise, the document

entitled "Notice of Entry of Judgment," which was filed July 11, 1940, and which is as dated July 10, 1940, and signed by David C. Levenson, as attorney for the plaintiff, which on its back purports to show service received July 10, 1940, by Paul Hitch, initialed "H. N." as attorney for the defendant.

Mr. Hitch: That is right.

Mr. Rosin: That is all we want from this file to be made a part of the record. We are not offering this as exhibits, so I will not offer this for the inspection by the Court, the envelope containing the exhibits which are part of that file, but there is no particular document [7] which I wish made part of this record.

The Referee: Then I better not see it if you are not going to offer it as part of the record.

Mr. Levenson: I suggest we make it part of the record.

The Referee: Then the reporter will copy every document if he is to make a transcript.

Mr. Levenson: Can we suggest this, can the Court examine the exhibits and verify them with the various findings so that the Court will know what they are, not for the purpose of making it part of the record, because the findings themselves refer to the exhibits; merely for the purpose so that the Court may identify those particular instruments. Can we let your Honor look at them for identification purposes?

The Referee: I don't think so. I can only see that or hear that which is part of the record here.

Mr. Levenson: This is part of the record.

The Referee: Part of the record of the Superior Court, but it is not part of the record here. This mortgage you have been talking about on real property, what real property was that?

Mr. Levenson: That is the real property in this other testimony.

The Referee: The home property.

Mr. Levenson: Yes.

Mr. Hitch: That was the one also set aside, the one on [8] the business and trust deed on the house.

Mr. Levenson: It was a mortgage, a straight note and mortgage.

Mr. Rosin: As I remember, Mr. Rollinson offered that file at the time he opened the case on behalf of Mrs. Averill and the Trustee in Bankruptcy.

Mr. Hitch: I believe that is correct.

The Referee: I would make the same ruling, then.

Mr. Rosin: I was trying to refresh my memory, whether it was in that record.

The Referee: All right. Leave this here for a few minutes.

Mr. Rosin: Now, we offer it as an exhibit, for the purpose of this record, pursuant to your Honor's statement before as to how it shall be drawn up in the transcript, the mortgage dated March 15, 1939, between Cyrus E. Averill, Jr., and Virginia Othelia Averill, husband and wife, to Glenn E. Bodell, which

mortgage was executed March 15, 1939, and recorded July 25, 1939, and is now Plaintiff's Exhibit No. 9, having been received as such on June 4, 1940, in action No. 448,466 in the Superior Court. We also offer the chattel mortgage dated March 15, 1939, between Cyrus Edward Averill, Jr., and Virginia O. Averill, husband and wife, to Glenn E. Bodell, which was executed March 15, 1939, recorded July 25, 1939, introduced as Plaintiff's Exhibit No. 7 on June 4, 1940, in action No. 448,466 in [9] the Superior Court. Likewise, we offer document entitled Notice of Mortgagee's election to take possession, etc., by virtue of the terms and covenants of a certain chattel mortgage executed by you to the undersigned on the 15th day of March, 1939, which notice is dated July 25, 1939, purportedly signed by Glenn E. Bodell and addressed to Cyrus Edward Averill, Jr. and Virginia O. Averill, husband and wife, now Plaintiff's Exhibit No. 8 in action No. 448,466 of the Superior Court, June 4, 1940, and attached to this and made a part of the same exhibit is another document entitled Notice of Sale and Chattel Mortgage, both being the same exhibit, the two separate documents, Plaintiff's Exhibit No. 8.

The Referee: You are offering the entire Plaintiff's Exhibit 8.

Mr. Rosin: That is it, on June 4th. Do you want to see these three I have offered? The others I will return, the envelope I will return.

The Referee: All right. Proceed.

Mr. Rosin: I will call Mr. Averill. [10]

CYRUS E. AVERILL, JR.,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: State your name.

The Witness: Cyrus E. Averill, Jr.

Mr. Rosin: The witness is being called pursuant to Section 21-J, your Honor, as a hostile witness.

The Referee: Very well.

Direct Examination

By Mr. Rosin:

Q. Mr. Averill, how long were you in business at the address 674 South Vermont?

A. Well, I was in business there from September, 1933, until about September, 1934, then I sold out. I had a partner when I went in there, and I sold out to him and went to Honolulu with a show. I came back in November of that year. He closed the place up in the meantime. Then I was still on the lease and I was forced to reopen it. That was in November, 1934, and I operated it up until the time that Bodell came in, which I think was in July of 1939, I believe.

Q. From then on it was Paradise Cafe?

A. Paradise Cafe, Inc.

Q. You were working for them,

A. I was working for them. [11]

Q. Until the time——

A. Then it was changed to Airport Cafe.

Q. Was it Airport Cafe prior to the bankruptcy?

A. No.

(Testimony of Cyrus E. Averill, Jr.)

Q. That is what I mean; up until the time of bankruptcy——

A. It was known as Bud Averill's Paradise Cafe, up until the time Mr. Bodell came in and foreclosed on the chattel mortgage and he formed Paradise Cafe, Inc.

The Referee: Let me get that straight in my mind. Before the foreclosure of Bodell's mortgage, what was the name of the cafe?

A. Bud Averill's Paradise.

Q. After the foreclosure of the mortgage and the change of possession, what was the name?

A. Paradise Cafe, Inc.

Q. But you already used your name, Bud Averill, on the outside of the building?

A. The name has always been there.

The Referee: Go ahead.

Q. By Mr. Rosin: In other words, from 1933 to the early part of 1934, you were in partnership with another person at this address?

A. From September, 1933, up until September 1934, about a year.

Q. Then you came back from Honolulu and you operated [12] at that location a place called Bud Averill's Cafe up to the time when the foreclosure took place under the chattel mortgage, which you testified was about July, 1939?

A. That is right.

Q. It was during that period that you were the

(Testimony of Cyrus E. Averill, Jr.)

individual owner that is, from 1934 until the middle of 1939, we will say? A. Yes, sir.

Q. Did you have any partners during that time?

A. Only one partner. I never had any partner from the time I reopened it in November of 1934.

Q. Until the time of the foreclosure?

A. No sir.

Q. After this Paradise Cafe, Inc. took over the place under the foreclosure, you continued your operations in that place personally, I mean, you were there?

A. I was there as manager and the use of my name.

Q. Pardon me?

A. I was hired as manager, with the understanding that they could use my name, keep my name out there, and that was for the consideration that they would pay off the indebtedness accumulated.

Q. Was there any period of time during which you were not present at the place, and I am speaking of the time when the foreclosure took place and the corporation took over, were you there day after day? [13]

A. Well, I went on a vacation. I was away about three weeks; went up into Utah shortly after the Paradise Cafe was incorporated.

Q. But at the time the foreclosure took place, do you remember what day that was?

A. I don't exactly. I believe it is in the records.

(Testimony of Cyrus E. Averill, Jr.)

Q. I believe July 29th, if those records are correct.

The Referee: What is that?

Mr. Rosin: The date when the foreclosure took place.

The Referee: Or sale.

Mr. Rosin: Yes, I think it was July 29th.

The Referee: The sale was on the 30th day of July, 1939.

Q. By Mr. Rosin: Up to and including July 30, 1939, you were at the place of business operating it?

A. Well, Mr. Bodell came in and served notice. I still stayed on there, but he did, too.

Q. How many days prior to the sale did he come into the picture?

A. Well, about eight or nine days, I believe.

Q. But you were there during all of those eight or nine days? A. Yes sir.

Q. The place was operating and you were in charge at the time of sale? A. Yes. [14]

Q. After the sale took place on July 30th, as I recall the date, assuming the next day was not Sunday, did the place open up for business the next day? A. Yes.

Q. Were you there that day, the next day after?

A. The next day after it opened?

Q. The day after the sale. I want to get myself clear. A. Yes, I was there.

(Testimony of Cyrus E. Averill, Jr.)

Q. You were there as an employee?

A. I was there, as I recall it, until I had transferred the liquor license, and so forth, in order that they could get that straightened out and get their Paradise Cafe, Inc. going. That is when I left.

Q. But were you on the payroll of Paradise Cafe, Inc. the day after the sale? A. Yes.

Q. You were on the payroll, at least, up to the time when you left for those three weeks vacation?

A. Yes.

Q. Were you paid for those three weeks vacation? A. Yes.

Q. By Paradise Cafe, Inc.? A. Yes.

Q. Then you came back and you operated in the same capacity as you had before you left for your vacation. I am speaking about after your vacation now, not before that. [15]

A. I came back as manager and entertainer.

Q. The same job you occupied before you left for your vacation? A. Yes.

Q. Have I made myself clear on that?

A. I believe that is right.

Q. You were manager and entertainer for Paradise Cafe, Inc., or Paradise Cafe up until the time the petition in bankruptcy was filed by the corporation, is that correct? A. That is right.

Q. You did not have any financial interest in the new corporation? A. I did not.

Q. Didn't invest any money in it?

A. No sir.

(Testimony of Cyrus E. Averill, Jr.)

Q. Is that the corporation that was owned solely by Mr. Bodell?

A. Yes, he was president, and his brother-in-law, too, they with me were officers of the corporation.

Q. He was the principal stockholder and largest money man in the corporation?

A. That is right. [16]

CYRUS E. AVERILL, JR.,
recalled.

Mr. Levenson: The witness is being examined under Section 21-J.

Q. Mr. Averill, do you recall that Paradise Cafe, Inc. was formed in August, 1939?

A. I wouldn't say for sure. I believe that is the date.

Q. At that particular time, or prior to that time, Bud Averill's Paradise Cafe had its bank account at the Bank of America, Wilshire and Shatto Place, isn't that true? A. That is true.

Q. Subsequent to that time Paradise Cafe, Inc. had its bank account at the same place, isn't that right? A. Paradise Cafe, Inc.

Q. In other words, there had been a transfer of your account into the account of the corporation account?

A. I believe that the new Paradise Cafe, Inc. opened their own bank account and set of books.

(Testimony of Cyrus E. Averill, Jr.)

Q. Didn't they take the funds from the Bud Averill Paradise Cafe account and open a new one for Paradise Cafe, Inc.? A. No.

Q. Isn't that true? A. No. [17]

Q. You signed the checks after it was incorporated, isn't that right?

A. Yes. It required two signatures, Mr. Bodell and myself.

Q. As manager you did practically the same thing that you did prior to the incorporation, isn't that right; you hired and fired, took charge of the place, did everything necessary, except Mr. Bodell used to come around occasionally?

A. No, Mr. Bodell was very much in evidence there. He put in some new people in there, put his brother-in-law in.

Q. Didn't you testify, Mr. Averill, that you hired and fired, in the last proceeding we had in the Superior Court?

A. I possibly did, I can't say for sure, but Mr. Bodell was very much in the place and he made several changes in there himself.

Q. You signed the checks. Either one of you could sign?

A. No, I believe at that time he had to sign.

Q. Do you know definitely whether that was the fact? A. Yes, that was the fact.

Q. Mr. Averill, at the time you gave the chattel mortgage to Mr. Bodell, that is, at the time you

(Testimony of Cyrus E. Averill, Jr.)

named him as mortgagee in that chattel mortgage, did you file notice of intention to chattel mortgage under our statute or did [18] you have anyone else do it for you?

A. What was your question, please?

(Question read.)

A. Well, that was all handled through Mr. Bodell's attorney, I believe.

Q. Mr. Bodell's attorney? A. Yes.

Q. You were the mortgagor?

A. That is right.

Q. Mr. Bodell was the mortgagee?

A. Yes.

Q. Who was Mr. Bodell's attorney?

A. Mr. Sheur.

Q. Isn't it a fact that Mr. Scheur was not admitted to practice law in the State of California?

A. I mean, he drew the papers up in Mr. Rollins's office. He was a notary public, I believe.

Q. And he drew up that notice of sale under the chattel mortgage, isn't that right?

Mr. Hitch: That is right.

Mr. Levenson: I think counsel will stipulate to that.

Mr. Hitch: Yes.

Mr. Levenson: Counsel will likewise stipulate that there was no notice of intention to sell in the seven-day period between the time of sale and notice under Section 3440. [19]

(Testimony of Cyrus E. Averill, Jr.)

Mr. Hitch: I will stipulate that the Court so found. I believe that is true.

Mr. Levenson: You remember that Mr. Rollinson stated to the Court that that was done.

Mr. Hitch: I believe that is true.

Mr. Levenson: That is all.

The Witness: Six days instead of seven. As I understand it, there was one day lacking the seven days when we made the sale.

The Referee: That is quite important, gentlemen, if there was any notice given at all.

The Witness: There was, your Honor.

Q. Do you have it in this record when it was given?

Mr. Hitch: I believe it is in this record.

The Referee: No, that is the notice of the election to sell. We are talking about the notice of intention to mortgage.

Mr. Levenson: There wasn't any, Mr. Hitch, you remember Mr. Rollinson stated so.

The Referee: Why do you state it was only six days; where do you get that from?

The Witness: The way I understand the law, it is supposed to be seven days from the time they file. I know they came out and picked up the notice in the kitchen and went outside the building.

The Referee: Was that notice to sell? [20]

The Witness: Notice of intention by Bodeh to take over.

The Referee: To foreclose?

(Testimony of Cyrus E. Averill, Jr.)

The Witness: To foreclose.

The Referee What I am talking about is, when you gave the chattel mortgage, this instrument here, which is Plaintiff's Exhibit 7 in the Superior Court case, when you gave that did you give any notice that you were going to give that chattel mortgage?

The Witness: That I don't know.

Mr. Hitch: What was the evidence on that?

Mr. Levenson: The evidence was, and Mr. Rollinson admitted there was no such notice; the evidence showed there was no notice of intention or any compliance with Section 3440.

The Referee Anything else?

Mr. Levenson: That is all.

The Referee: Any questions, Mr. Hitch?

Mr. Levenson: Do you have any questions, Mr. Rosin?

Mr. Rosin No, that is all.

The Referee: Do you have any questions, Mr. Hitch?

Mr. Hitch: I don't think so.

Mr. Rosin: One question. You were operating a cafe, had always operated a cafe, had you not, from 1934 to 1939, eating and drinking places?

A. Yes. [21]

The Referee: Anything else?

Mr. Hitch: Is your Honor clear of this complete transaction, as to any questions in that record that you want to be enlightened on?

(Testimony of Cyrus E. Averill, Jr.)

The Referee: When we get through with the evidence.

Mr. Hitch: That is all.

Mr. Rosin: The findings of fact, Section 6 thereof, relate that the said defendant failed to publish a notice of intention to chattel mortgage within a seven-day period or at any time prior thereto.

Mr. Hitch: I think that is true.

The Referee: Step down, please.

Mr. Levenson: That is all.

The Referee: Are you all through now?

Mr. Levenson: We are all through. We stand on the record and the testimony.

Mr. Hitch: We are all through.

(Argument.)

The Referee: I will mark it submitted, 7, 7, and 5. [22]

State of California,
County of Los Angeles—ss.

I, E. N. Frankenberger, hereby certify that the foregoing 22 pages of typewritten matter comprise a full, true and correct transcript of the testimony and proceedings adduced at the hearing before the Hon. Benno M. Brink, Referee in Bankruptcy, at Los Angeles, California, on April 18, 1941, at 2 o'clock P. M., in the matter of Cyrus E. Averill, Jr., Bankrupt, No. 36534-C, with the exception of

certain testimony relating to the keeping of books and accounts by the bankrupt.

E. N. FRANKENBERGER

[Endorsed]: Filed Sept. 11, 1941. [23]

[Endorsed]: No. 10036. United States Circuit Court of Appeals for the Ninth Circuit. Cyrus E. Averill, Jr., Appellant, vs. Francis F. Quittner, Trustee in Bankruptcy of the Estate of Cyrus E. Averill and Floyd C. Balding, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 31, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals for
the Ninth *District*

No. 10036

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy
of the Estate of Cyrus E. Averill, Jr., and
Francis C. Balding,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL, AND DESIGNATION OF THE
PORTIONS OF RECORD FOR CONSID-
ERATION THEREOF

A. STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL.

In connection with the appeal taken herein by
Cyrus E. Averill, Jr., Bankrupt, from the judgment
entered in the above entitled proceedings on No-
vember 1, 1941, confirming the order of the Referee
in Bankruptcy, denying the discharge of said bank-
rupt, the Appellant, the bankrupt above named,
hereby, pursuant to Federal Rules of Civil Pro-
cedure No. 75-D, and Rule 19-(6) of the Circuit
Court of Appeals, refers to the Points on which he
intends to rely on the appeal as filed in the Dis-

trict Court and set out in the District Court Clerk's transcript of record upon appeal at pages 27-28, inclusive.

B. DESIGNATION OF PORTIONS OF THE RECORD FOR CONSIDERATION THERE-OF.

Comes now Appellant and designates portions of the record necessary for the consideration of the points on appeal as designated:

1. Bankrupt's voluntary petition.
2. Objections to Bankrupt's discharge.
3. Memorandum of Decision by Referee.
4. Order Denying Discharge, by Referee.
5. Petition of Bankrupt for extension of time to file Petition for Review of Referee's Order.
6. Order extending time to file Petition for Review, by the Referee.
7. Petition of Bankrupt for Review of Referee's Order.
8. Certificate of Referee on Review set out in the District Court Clerk's Transcript of Record upon Appeal at page 21.
9. Order of the District Court confirming the Referee's Order denying discharge and set out in the District Court Clerk's Transcript of record upon appeal at page 24, and dated November 1, 1941.
10. Notice of appeal by Bankrupt to the Circuit Court.

11. Original stipulation and stipulation as to additional records with reference to the contents of the Record on appeal.

a. Complaint in Superior Court case.

b. Findings of Fact and Conclusions of Law.

c. Judgment in Superior Court case.

12. The testimony referring to Reporter's transcript, 1 volume, and the exhibits as set forth in the stipulation as to contents designated item No. 11.

13. Directions for service of notice of appeal.

14. Statement of Points on Appeal.

Dated: January 27, 1942.

Respectfully submitted,

MARTIN GENDEL,

Attorney for Appellant

Received copy of the within Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Portions of Record for Consideration Thereof this 30th day of Jan., 1942.

NAT ROSIN

KENNETH E. MATOT

DAVID C. LEVENSON

By NAT ROSIN

Attorneys for Appellee.

[Endorsed]: Filed Jan. 31, 1942. Paul P. O'Brien,
Clerk.